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May 3, 2024
State of Nevada
E.M.R.B.
2:15 p.m.

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

SUSAN HERRON,

Complainant,

v.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,

Respondent.

Case Number: 2024-015

COMPLAINT

COMPLAINANT, SUSAN HERRON, by and through her undersigned counsel of record JASON D. GUINASSO, ESQ. of GUINASSO LAW, LTD., pursuant to NRS 288.110 (2) and NAC 288.200, hereby files this complaint as follows:

JURISDICTION

1. Pursuant to NRS 288.110 (2) the Nevada Government Employee-Management Relations Board ("EMRB") has jurisdiction to hear complaints arising out of the interpretation of, or performance under, the provisions of NRS Chapter 288.

2. Pursuant to NRS 288.110 (2), and NAC 288.200, SUSAN HERRON seeks relief for violations of NRS Chapter 288.

3. This Complaint is timely pursuant to NRS 288.110(4) because it is within "6 months after the occurrence which is the subject of the complaint or appeal."

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PARTIES

4. Complainant, Susan Herron is a local government employee of Incline Village General Improvement District as defined by NRS 288.050. Ms. Herron has been employed by Incline Village General Improvement District since 2003. Currently, Ms. Herron is employed by Incline Village General Improvement District as the Director of Administrative Services. Pursuant to NRS 288.138, Ms. Herron is a supervisory employee, and pursuant to NRS 288.132, Ms. Herron is an administrative employee. For purposes of these proceedings, Ms. Herron's address is: c/o Jason D. Guinasso, Esq., GUINASSO LAW, LTD., 5371 Kietzke Lane, Reno, NV 89511, telephone number: (775) 993-8899.

5. Respondent, Incline Village General Improvement District ("IVGID") is a local government employer as defined by NRS 288.60. IVGID's address is 893 Southwood Boulevard, Incline Village, Nevada 89451, and its telephone number is (775) 832-1100.

FACTUAL ALLEGATIONS
(Statement of Facts)

6. Susan Herron has been employed by IVGID since 2003.

7. In addition to working for IVGID she is a resident and active member of the Incline Village Crystal Bay community.

8. As a resident of the Incline Village Crystal Bay community, she has a right to vote in the local government elections and participate in any campaign efforts she chooses in her personal capacity.

9. On or about, June 16, 2023, the political action committee, The Committee to Recall IVGID Trustee Matthew Dent, filed a Petition to Recall Trustee Matthew Dent on the basis that the Committee to Recall alleged Trustee Matthew Dent was not adequately representing the community of Incline Village and Crystal Bay.

10. On that same date, the political action committee, The Committee to Recall IVGID Trustee Sara Schmitz, filed a Petition to Recall Trustee Sara Schmitz on the basis that the

Committee to Recall alleged Trustee Sara Schmitz was not adequately representing the community of Incline Village and Crystal Bay community.

11. On June 23, 2023, two new petitions were reissued by the political action committees, The Committee to Recall IVGID Trustee Matthew Dent, and The Committee to Recall IVGID Trustee Sara Schmitz.

12. On July 27, 2023, Susan Herron's husband, Mark Herron contributed $1,250.00 to the political action committee, "The Committee to Recall IVGID Trustee Matthew Dent."

13. On September 27, 2023, Susan Herron's husband, Mark Herron contributed $1,250.00 to the political action committee, "The Committee to Recall IVGID Trustee Sara Schmitz."

14. On November 27, 2023, the Committee to Recall IVGID Trustee Matthew Dent filed its Recall Contributions and Expenses Report with the Nevada Secretary of State wherein the monetary contribution of Mark Herron made on July 27, 2023, was reflected. This report is a public record.

15. On November 27, 2023, The Committee to Recall IVGID Trustee Sara Schmitz filed its Recall Contributions and Expenses Report with the Nevada Secretary of State wherein the monetary contribution of Mark Herron made on September 27, 2023, was reflected. This report is a public record.

16. Trustee Dent and Trustee Schmitz publicly and privately complained about Ms. Herron's presumed involvement in the effort to recall them.

17. Trustee Dent and Trustee Schmitz also complained publicly and privately about Ms. Herron's association with members of the community supporting the recall against them.

18. Trustee Dent and Trustee Schmitz expressed their displeasure with Susan Herron providing Notarial services to the individuals who sought out her services for their recall petitions and even went so far as to seek out who paid for Susan Herron's Notarial supplies and bond [Ms. Herron pays for all her own supplies and bonds which is well known].

19. Then Director of Finance Bobby Magee, who is now the District's General Manager, was provided by Sara Schmitz an email containing a CSV file. This is important for three reasons – (1) then Director of Finance Bobby Magee was NOT Susan Herron's supervisor rather he was her equal as a member of the Senior Team; (2) then Director of Finance Bobby Magee had been employed with the Incline Village General Improvement District for approximately 6 months; and (3) this same CSV file was the basis for Susan Herron's placement on paid administrative leave.

20. On November 14, 2023, Susan Herron was abruptly and without any explanation or notice placed on paid administrative leave pending an investigation into "allegations".

21. There was no written complaint against Ms. Herron.

22. Ms. Herron was not informed of the allegations against her when she was placed on leave even though she asked.

23. Upon information and belief, the adverse employment action against Ms. Herron was initiated and encouraged by Trustees Sara Schmitz and Matthew Dent and then Interim Director of Finance Bobby Magee.

24. The adverse employment action was unlawful, blatant harassment, and inappropriate retaliation against Ms. Herron for exercising her Constitutional right to free association, free speech, and freedom to participate in the recall effort during the summer of 2023.

25. Being placed on leave and investigated caused Ms. Herron severe emotional distress and caused her to fear that Trustees Sara Schmitz and Matthew Dent were attempting to use their positions as Trustees to have her terminated in retaliation for supporting the recall efforts against them.

26. Ms. Herron was placed on leave for 14 weeks.

27. This is the first time an employee of IVGID has ever been placed on leave pending an investigation without being put on notice regarding what was being investigated.

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28. As stated above, Ms. Herron was only told that she had been placed on administrative leave pending an investigation into "allegations."

29. As stated above, Ms. Herron was not informed, at the time of being placed on paid administrative leave, what the allegations included, who made the allegations, or what evidence existed to support the allegations and the related adverse employment action.

30. Ms. Herron requested: (a) Identification of the person(s) who made the complaint that resulted in Ms. Herron being placed on administrative leave and investigated; (b) identification and production of all evidence provided in support of the complaint, if any; and (c) a detailed written explanation as to why it took so long to secure an investigator and complete the investigation.

31. Ms. Herron was never informed of what the "allegations" being investigated included, until she met with IVGID's outside investigator, Paul J. Anderson, for an investigative interview on February 1, 2024, which was conducted via Zoom and at which Ms. Herron was present and her attorney, Jason Guinasso, was also present.

32. Mr. Anderson was surprised she had not been informed about the allegations as well and gave Ms. Herron the option of rescheduling the interview. However, Ms. Herron proceeded with the interview in good faith because she had not violated any law or policy and had not otherwise engaged in misconduct.

33. On February 15, 2024, Ms. Herron sent a letter through her legal counsel to Mike Bandelin, then Interim General Manager for IVGID, placing Mr. Bandelin on notice that she had been on leave for over three months without any information concerning the status of the investigation, how long she should expect to remain on administrative leave, and the next steps in the process. It should be noted that one of the conditions of being on this administrative leave was that Ms. Herron had to be readily available to return to work upon request by IVGID.

34. Following the investigation, Ms. Herron also requested the investigator's report.

35. Ms. Herron's request was summarily denied three times and continues to be denied to this date as Ms. Herron filed a complaint with the Incline Village General Improvement District upon her return, for harassment and retaliation, in accordance with employee policies. To date, this complaint has only resulted in the interview of Ms. Herron by a Senior Human Resources professional.

36. Upon information and belief, the result of the investigation was a finding that Ms. Herron did not engage in any wrongdoing.

37. Despite there being no evidence of Ms. Herron violating a law or an IVGID policy, she was removed from work for over three months.

38. Putting Ms. Herron under investigation based on frivolous secret allegations was blatant retaliation against Ms. Herron by certain IVGID Trustees and a member of Staff who, upon information and belief, pushed for this investigation due to their angst over Ms. Herron's "political or personal reasons or affiliations," in violation of her rights under state law. *See* NRS 281.370(1) and (2); NRS 288.270(1)(f) (for local government employers) and NRS 288.270(2)(c) (for local government employees and employee organizations).

39. The administrative leave of absence and sham investigation initiated without knowing what Ms. Herron was being investigated for and who had initiated the complaint caused her emotional and mental harm, took a toll on her physical health and well-being, and caused irreparable harm and damage to her reputation and has otherwise had a chilling effect on Ms. Herron and other public employees efforts to engage in political activity, association, and free speech in opposition to the Trustees.

CLAIM FOR RELIEF
Discrimination because of Political or Personal Reasons or Affiliations
(Engaging in Prohibited Practices in violation of
NRS 281.370(1) and (2), NRS 288.270 (1)(f), and NRS 288.280)

40. Susan Herron incorporates paragraphs 1-39 into this section of the Complaint as if fully set forth herein.

41. It is a prohibited practice for a local government employer or its designated representative to willfully discriminate against a public employee for "political or personal reasons or affiliations." *See* NRS 281.370(1) and (2); NRS 288.270(1)(f) (for local government employers) and NRS 288.270(2)(c) (for local government employees and employee organizations).

42. Under NRS 288.270 (1)(f), "It is a prohibited practice for a local government employer or its designated representative willfully to:[] Discriminate because of race, color, religion, sex, sexual orientation, gender identity or expression, age, physical or visual handicap, national origin or because of **political or personal reasons or affiliations**."

43. NRS 281.370 further provides that:

> 1. All personnel actions taken by state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof must be based solely on merit and fitness.
>
> 2. State, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment or discriminate against any person in compensation or in other terms or conditions of employment because of the person's race, creed, color, national origin, sex, sexual orientation, gender identity or expression, age, political affiliation or disability, except when based upon a bona fide occupational qualification.

44. The EMRB has adopted a formal definition of "personal reasons." *See Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of N. Las Vegas v. Glazier*, Case No. 50781 (unpublished 2010)). The EMRB, referencing Black's Law Dictionary, defined "personal reasons" as follows:

> Black's Law Dictionary defines "Personal" to mean "[appertaining to the person; belonging to an individual. . . " Black's Law Dictionary 702 (6th ed. 1991). Additionally, the term "political or personal reasons or affiliations" is preceded in NRS 288.270(1)(f) by a list of factors, "race, color, religion, sex, age, physical or visual handicap, national origin," that can best be described as "non-merit-or-fitness" factors, i.e., factors that are unrelated to any job requirement and not

> otherwise made by law a permissible basis for discrimination. The doctrine of *ejusdem generis* states that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to those things of the same general class as those enumerated. Black's Law Dictionary 357 (6th ed. 1991). **Thus, the proper construction of the phrase "personal reasons or affiliations" includes "non-merit-or-fitness" factors, and would include the dislike of or bias against a person which is based on an individual's characteristics, beliefs, affiliations, or activities that do not affect the individual's merit or fitness for any particular job**.

Id. (**emphasis supplied**). Since 2005, this has been the definitive definition of discrimination based upon personal reasons.

45. IVGID, at the direction of certain disgruntled Trustees and a member of Staff, engaged in prohibited practices by discriminating against Ms. Herron for "political or personal reasons or affiliations."

PRAYER FOR RELIEF

WHEREFORE, the Complainant respectfully requests the following relief:

1. For a finding in favor of Complainant and against Respondent on each and every claim of this Complaint.

2. For a determination that IVGID has violated NRS 281.370(1) and (2); NRS 288.270(1)(f), and NRS 288.270(2)(c) and engaged in prohibited practices by discriminating against Ms. Herron for "political or personal reasons or affiliations."

3. For an order directing IVGID to cease and desist from violating the rights of Susan Herron;

4. For an order that Complainant be reimbursed for attorney's fees and costs in this action; and

5. For such other and further relief as may be necessary or appropriate.

Dated this 3rd day of May, 2024.

GUINASSO LAW, LTD.

By: ______________________

Jason D. Guinasso, Esq. (SBN# 8478)
Attorney for Complainant

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CERTIFICATE OF SERVICE

Pursuant to NAC 288.200 (2), I caused a true and correct copy of the **COMPLAINT** to be served on the following individuals by depositing for mailing with postage prepaid via certified U.S. mail on this 3rd day of May, 2024:

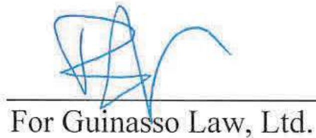
Sara Schmitz, Chair
Incline Village General Improvement District
893 Southwood Boulevard
Incline Village, Nevada 89451
Certified U.S. Mail No. 9589 0710 5270 0568 6150 02

Courtesy Copy to:

Sergio Rudin, Esq.
Anne Branham, Esq.
Best Best & Krieger, LLP
500 Capitol Mall
Sacramento, California 95814
Sergio.rudin@bbklaw.com
anne.branham@bbklaw.com

Certified U.S. Mail No.: 9589 0710 5270 0568 6150 19

Attorneys for Incline Village General Improvement District



For Guinasso Law, Ltd.

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FILED
May 23, 2024
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11:11 a.m.

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

SUSAN HERRON,

Complainant,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

Respondent.

Case No.: 2024-015

RESPONDENT'S MOTION TO DISMISS

Respondent Incline Village General Improvement District ("Respondent"), by and through its attorney of record, Nick D. Crosby, Esq. of Marquis Aurbach, hereby files its Motion to Dismiss in the above-referenced matter. This Motion is made and based upon the Memorandum of Points and Authorities, the pleadings and papers on file herein and any oral argument allowed by counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Complaint must be dismissed because Complainant failed to state a claim upon which relief can be granted. Specifically, the Complaint does not allege a legally recognized adverse employment action, which is necessary for her asserted claim. Moreover, Complainant relies upon a statute that does not apply to Respondent and, in any event, is outside the statutory jurisdiction of the Board. As such, the Complaint must be dismissed.

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II. STATEMENT OF FACTS

A. THE PARTIES.

Respondent is a local government employer, as defined in Nevada Revised Statute 288.060. (Compl., ¶ 5) Complainant, Susan Herron ("Complainant"), has been employed by Respondent since 2003 and is a local government employee, as defined in Nevada Revised Statute 288.050. (Id. at ¶¶ 4 and 6).

B. THE COMPLAINT.[1]

Complainant alleges that on or about June 16, 2023, a political action committee, The Committee to Recall IVGID Trustee Mathew Dent ("Dent PAC"), filed a petition to recall Trustee Matthew Dent ("Dent") and, on that same date, another political action committee, The Committee to Recall IVGID Trustee Sara Schmitz ("Schmitz PAC"), filed a similar petition to recall Trustee Sara Schmitz ("Schmitz"). (Compl. at ¶¶ 9-10). One week later, new petitions were issued by the PACs against Dent and Schmitz. (Id. at ¶ 11).

On July 27, 2023 and September 27, 2023, Complainant's husband, Mark Herron ("Mark"), contributed to the respective PACs. (Id. at ¶¶ 12-13). On November 27, 2023, both PACs filed their respective Contributions and Expenses Reports with the Nevada Secretary of State, which publicly disclosed the contributions made by Complainant's husband, Mark. (Id. at ¶¶ 14-15).

Complainant alleges that Dent and Schmitz publicly and privately complained about Complainant's "presumed involvement in the effort to recall" the Trustees, as well as Complainant's association with members of the community who supported the recall effort. (Id. at ¶¶ 16-17). Moreover, Complainant alleges that Dent and Schmitz "expressed their displeasure" about Complainant providing notary services to people who used Complainant for acknowledging the petitions. (Id. at ¶ 18).

The Complainant also alleges that the former Director of Finance, Bobby Magee ("Magee"), who is the current General Manager for Respondent, sent Schmitz an email which

[1] For purposes of this Motion, Respondent assumes the allegations in the Complaint are true and accurate.

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contained a CSV file, to which Complainant alleges was the basis for Respondent placing Complainant on paid administrative leave. (Id. at ¶ 19). The Complainant was advised that she was being placed on paid administrative leave on November 14, 2023 pending an investigation. (Id. at ¶ 20). The Complaint states the "adverse employment action" – specifically, being placed on paid administrative leave – was "unlawful, blatant harassment, and inappropriate retaliation against [Complainant] for exercising her Constitutional right to free association, free speech, and freedom to participate in the recall effort…." (Id. at ¶¶ 23-24). Complainant remained on paid administrative leave for 14 weeks and was not notified of the allegations against her until she was interviewed by an outside investigator hired by Respondent, which occurred on February 1, 2024. (Id. at ¶ 31). Complainant alleges that, in total, she was on paid administrative leave for three months. (Id. at p. 37).

Based upon the foregoing, Complainant asserted violations of Nevada Revised Statute 281.370(2), Nevada Revised Statute 288.270(1)(f) and Nevada Revised Statute 288.280 for discrimination because of political or personal reasons or affiliations.

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III. LEGAL ARGUMENT

A. COMPLAINANT'S NRS 288.280 CLAIM IS UNTENABLE AS A MATTER OF LAW.

The Complaint alleges Respondent discriminated against the Complainant in violation of Nevada Revised Statute 288.280. (Compl. at p. 6:22-24). The statute states:

> **NRS 288.280 Controversies concerning prohibited practices to be submitted to Board.** Any controversy concerning prohibited practices may be submitted to the Board in the same manner and with the same effect as provided in NRS 288.110, except that an alleged failure to provide information as provided by NRS 288.180 must be heard and determined by the Board as soon as possible after the complaint is filed with the Board.

Nev. Rev. Stat. 288.280. There is no reference in the statute to, or probation of, discrimination based upon personal or political reasons, as alleged in the Complaint. As such, there can be no claim asserted for discrimination under the statute. In fact, Nevada Revised Statute 288.280 does not even provide for *any* claim and, instead, is a procedural statute addressing the submission of a complaint to the Board and the timing as to when the Board is required to hear a case. *See* id. As such, the claim for a violation of Nev. Rev. Stat. 288.280 must be dismissed.

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B. THE BOARD DOES NOT HAVE JURISDICTION OVER COMPLAINANT'S CHAPTER 281 CLAIM.

As part of her discrimination claim, Complainant asserts the Respondent violated Nevada Revised Statute 281.370(1) and (2), but the Board does not have jurisdiction to hear claims arising under this statute. Nevada Administrative Code 288.410(1)(d) permits the Board to refuse to issue a declaratory order if "[t]he matter is not within the jurisdiction of the Board." Nev. Admin. Code 288.410(1)(d). The Board as long-held that "its authority is limited to matters arising out of the interpretation of, or performance under, the provisions of the Employee-Management Relations Act." *See e.g., Water Employees Ass'n of Nev. v. Las Vegas Valley Water Dist.*, Case No. 2019-002, Item No. 841 (June 2019) (citing NRS 288.110(2) and *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 895, 59 P.3d 1217 (2002); *see also*, *Local Gov't Employee-Management Relations Bd. v. Gen. Sales Drivers, Delivery Drivers and Helpers, Teamsters Local Un. No. 14 of Intern. Broth. of Teamsters, Chauffeurs, Warehouseman and Helpers of Amer.*, 98 Nev. 94 (1982)). Because the Board's jurisdiction is limited to only the enforcement and interpretation of Chapter 288, it does not have jurisdiction to hear any claims arising from Chapter 281 of the Nevada Revised Statute.

Moreover, Chapter 281 does not apply to the Respondent. The statute specifically applies only to the State and its departments, which does not include Respondent. *See* Nev. Rev. Stat. 281.001 and 281.002. Notwithstanding, the Complainant does not have a viable cause of action under the statute in this forum because the Nevada Supreme Court held over three decades ago that Nevada Revised Statute 281.370 "does not provide for any private right of action." *Palmer v. State*, 106 Nev. 151, 154, 787 P.2d 803, 805 (1990).

C. THE COMPLAINANT'S NRS 288.270(1)(F) CLAIM MUST BE DISMISSED BECAUSE THE COMPLAINANT DID NOT SUFFER AN ADVERSE EMPLOYMENT ACTION.

Finally, the Complainant's claim for discrimination for personal or political reasons fails as a matter of law because the Complainant did not suffer an adverse employment action. Nevada Revised Statute 288.270(1)(f) prevents a local government employer or its representative from willfully discriminating for, *inter alia*, political or personal reasons or affiliations. The

1 Nevada Supreme Court has held that in order for a claimant to assert a claim for discrimination
2 under this statute:

3 > [a]n aggrieved employee must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden of proof shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. The aggrieved employee may then offer evidence that the employer's proffered "legitimate" explanation is pretextual and thereby conclusively restore the inference of unlawful motivation.
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8 *Bisch v. Las Vegas Metro. Police Dept.*, 129 Nev. 328, 340, 302 P.3d 1108. 1116 (2013)
9 (quoting *Reno Police Protective Ass'n*, 102 Nev. at 101-102 (additional citations omitted)). The
10 *Bisch* court went on to hold that "it is not enough for the employee to simply put forth evidence
11 that is capable of being believed; rather, this evidence must actually be believed by the fact
12 finder." *Id.* (citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994). In
13 the context of a claim for discrimination for political or personal reasons or affiliations, "this
14 presupposes that the employee has also produced some evidence of an adverse employment
15 action taken by the employer against the employee." *Ducas v. Las Vegas Metro. Police Dept.*,
16 Case No. 2015-003, Item No. 812 *6 (Feb. 4, 2016).

17 As a matter of law, a paid suspension is not an adverse employment action. Indeed, the
18 Eleventh Circuit recently stated:

19 > Whether suspension with pay can rise to the level of an adverse employment action in discrimination cases appears to be an issue of first impression in this Circuit. Many of our sister circuits, however, have already addressed the issue.
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21 > No circuit has held that a simple paid suspension, in and of itself, constitutes an adverse employment action. *See Joseph v. Leavitt*, 465 F.3d 87 (2d Cir. 2006) (holding that paid leave there did not constitute an adverse employment action but leaving open the possibility that a paid suspension or accompanying investigation carried out in an exceptionally unreasonable or dilatory way may constitute an adverse employment action); *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015) (same); *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001) *abrogated on other grounds by Burlington N.*, 548 U.S. at 68, 126 S.Ct. 2405 (holding that, categorically, paid suspension or leave is not an adverse employment action); *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000) (same); *Peltier v. United States*, 388 F.3d 984 (6th Cir. 2004) (same); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772 (7th Cir. 2007) (same); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012) *1267 (same); *Haddon v. Exec. Residence at White House*, 313 F.3d 1352 (Fed. Cir. 2002) (same).
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1 *Davis v. Legal Services Alabama, Inc.*, 19 F.4th 1261, 1266-67 (11th Cir. 2021) *cert. denied* 2024
2 WL 1839097 (Apr. 29, 2024). In agreeing with the sister circuit courts, the Eleventh Circuit
3 held:

4 > A paid suspension can be a useful tool for an employer to hit "pause" and investigate when an employee has been accused of wrongdoing. And that is particularly so in a case like this one—where the employee under investigation is in charge of all the employees who are the witnesses. As a practical matter, employers cannot expect employees to speak freely to investigators when the person under investigation is looking over their shoulders. Employers should be able to utilize the paid-suspension tool in good faith, when necessary, without fear of Title VII liability.
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9 *Id.* at 1267. In the context of a claim for unconstitutional denial of due process for a government
10 employee, the Ninth Circuit held that placing the employee on paid administrative leave did not
11 deprive the subject employee of her constitutionally-protected property interest. *See Gravitt v.*
12 *Brown*, 74 Fed. Appx. 700, 703-04 (9th Cir. 2003) (unpublished). Even in the case cited in the
13 Complaint, *Kilgore v. City of Henderson Police Dept.*, Case No. A1-045763, in Item No. 550C,
14 the Board, in granting a motion for preliminary injunction, ordered the City "to maintain status
15 quo ante as of [the date the complainant was terminated]" and, in a subsequent decision, the
16 Board approved the City's decision to keep the complainant on administrative leave with pay and
17 benefits pursuant to the status quo ante order until the completion of the underlying arbitration
18 and proceedings before the Board. *Id.* and Item No. 550E. Thus, while not presented with the
19 specific issue of whether a paid administrative leave order constitutes an adverse employment
20 action, the Board has tacitly found the same does not, by virtue of Item No. 550E in *Kilgore*.
21 Moreover, the Federal District Court for Nevada, in an unpublished opinion, found a plaintiff
22 failed to provide any case establishing that being investigated by an employer amounted to an
23 adverse employment action. *See Peterson v. Washoe Cnty.*, 2010 WL 1904475 *3 (D. Nev.
24 2010).

25 Here, the alleged adverse employment action asserted in the Complaint is that
26 Complainant was placed on paid administrative leave. (Compl. at ¶¶ 29 and 39). Because
27 placement to a paid administrative leave status is not, as a matter of law, an adverse employment
28 action, the claim for discrimination under Nev. Rev. Stat. 288.270(1)(f) must be dismissed.

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IV. CONCLUSION

The Complaint must be dismissed because it fails to state a claim upon which relief can be granted under the Act. The Board is without jurisdiction to hear any claim asserted outside of chapter 288 and Nevada Revised Statute chapter 281 does not apply to the Respondent. Moreover, placement on paid administrative leave is not, as a matter of law, an adverse employment action. As such, the Complaint must be dismissed.

Dated this 23rd day of May, 2024.

MARQUIS AURBACH

By *s/ Nick D. Crosby*
Nick D. Crosby, Esq.
Nevada Bar No. 8996
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of May, 2024, I served a copy of the foregoing **RESPONDENT'S MOTION TO DISMISS** upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

Jason D. Guinasso, Esq.
5371 Kietzke Lane
Reno, NV 89511
Attorney for Complainant

and that there is a regular communication by mail between the place of mailing and the place(s) so addressed.

s/Sherri Mong
an employee of Marquis Aurbach

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

SUSAN HERRON,

Complainant,

v.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,

Respondent.

Case Number: 2024-015

COMPLAINANT'S OPPOSITION TO MOTION TO DISMISS

COMPLAINANT, SUSAN HERRON, by and through her undersigned counsel of record JASON D. GUINASSO, ESQ. of GUINASSO LAW, LTD., hereby opposes the Respondent's Motion to Dismiss in the above referenced matter and is based upon the following points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respectfully, Respondent's Motion to Dismiss utterly lacks merit. As an initial matter, the Motion fails to apply the law it references to the facts and circumstances of this instant action and is simply a restatement of law as it relates generally to complaints in EMRB proceedings. The EMRB should DENY Respondent's Motion to Dismiss for the following reasons: 1) IVGID has engaged in Prohibited Practices by discriminating against Susan Herron because of Political or Personal Reasons or Affiliations which is in violation of NRS 281.370(1) and (2), NRS 288.270

(1)(f), and NRS 288.280; 2) This Board has jurisdiction over Ms. Herron's Complaint pursuant to NRS 288.110; and, 3) At this stage, the Board must assume that Ms. Herron has suffered an adverse employment action; therefore, summary dismissal is premature and inappropriate.

II. ARGUMENT

A. IVGID has engaged in Prohibited Practices by discriminating against Susan Herron because of Political or Personal Reasons or Affiliations which is in violation of NRS 281.370(1) and (2), NRS 288.270 (1)(f), and NRS 288.280.

Respondent's assertion that there is no probation of discrimination based upon personal or political reasons is outrageous and a narrow, incorrect reading of NRS 288.280 without a reading of the entire chapter of NRS 288.

NRS 288.280 explicitly states:

> Controversies concerning prohibited practices to be submitted to Board.
>
> Any controversy concerning **prohibited practices** may be submitted to the Board in the same manner and with the same effect as provided in NRS 288.110, except that an alleged failure to provide information as provided by NRS 288.180 must be heard and determined by the Board as soon as possible after the complaint is filed with the Board.

Further, NRS 288.110 explicitly states in relevant part:

> Rules governing various proceedings and procedures; hearing and order; injunction; time for filing complaint or appeal; costs.
>
> 1. The Board may make rules governing:
> (a) Proceedings before it;
> (b) Procedures for fact-finding;
>
> ...
>
> 2. The Board may hear and determine any complaint arising out of the interpretation of, or performance under, the **provisions** *of this chapter* by the Executive Department, any local government employer, any employee, as defined in NRS 288.425, **any local government employee,** any employee organization or any labor organization.
>
> ...
>
> **The Board, after a hearing, if it finds that the complaint is well taken, may order any person or entity to refrain from the action**

complained of or to restore to the party aggrieved any benefit of which the party has been deprived by that action. [emphasis added]

...

3. **Any party aggrieved by the failure of any person to obey an order of the Board issued pursuant to subsection 2, or the Board at the request of such a party, may apply to a court of competent jurisdiction for a prohibitory or mandatory injunction to enforce the order.**

4. **The Board may not consider any complaint or appeal filed more than 6 months after the occurrence which is the subject of the complaint or appeal.**

5. The Board may decide without a hearing a contested matter:

(a) In which all of the legal issues have been previously decided by the Board, if it adopts its previous decision or decisions as precedent; or

(b) Upon agreement of all the parties.

6. The Board may award reasonable costs, which may include attorneys' fees, to the prevailing party.

...

Further, NRS 288.270 states:

1. It is a **prohibited practice** for a **local government employer** or its designated representative willfully to:

...

(f) Discriminate because of race, color, religion, sex, sexual orientation, gender identity or expression, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations. [emphasis added]

NRS 288.050 defines a **"local government employee"** as, "...any person employed by a local government employer."

NRS 288.060 defines a **"local government employer"** as:

...any political subdivision of this State or any public or quasi-public corporation organized under the laws of this State and includes, without limitation, counties, cities, unincorporated towns, school districts, charter schools, hospital districts, irrigation districts and other special districts.

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1 Here, IVGID is a quasi-public agency and quasi-municipal corporation established by
2 Washoe County in 1961 under NRS 318 and, therefore, as alleged in Ms. Herron's Complaint, is
3 defined as a "government employer" pursuant to NRS 288.060. Ms. Herron has appropriately
4 alleged in her Complaint, that she is a "local government employee" of IVGID pursuant to NRS
5 288.050. Pursuant to NRS 288.270, IVGID is absolutely prohibited from discriminating against
6 Ms. Herron for her political or personal affiliations.

7 The facts Ms. Herron alleges in her Complaint clearly state that IVGID has engaged in a
8 prohibited practice as defined in NRS 288 and further, specifically and clearly alleges IVGID is
9 in violation of NRS 288.270. Therefore, the Board clearly has authority to take the Complaint
10 before it, may order IVGID to refrain from discriminating against Ms. Herron, and may further
11 order that Ms. Herron be restored any benefit she has been deprived as a result of the
12 discrimination.

13 For the reasons stated above the Board should take Ms. Herron's Complaint before it and
14 should not dismiss Ms. Herron's Complaint.

15

16 **B. This Board has Jurisdiction over Ms. Herron's Complaint pursuant to NRS 288.110.**

17 Respectfully, Ms. Herron incorporates by reference all arguments made above. In the
18 interest of brevity, for all the reasons stated above, and a full reading of NRS 288 clarifies quickly,
19 that the EMRB is vested with jurisdiction over Ms. Herron's Complaint contrary to Respondent's
20 bald assertions.

21 To be clear and as stated above, NRS 288.110 explicitly states in relevant part:

22 Rules governing various proceedings and procedures; hearing and
23 order; injunction; time for filing complaint or appeal; costs.

24 1. The Board may make rules governing:
(a) Proceedings before it;
25 (b) Procedures for fact-finding;

...
26 2. The Board may hear and determine any complaint arising
27 out of the interpretation of, or performance under, the **provisions of**

> **this chapter** by the Executive Department, any local government employer, any employee, as defined in NRS 288.425, **any local government employee**, any employee organization or any labor organization. [emphasis added]

As previously stated above, and appropriately alleged in Ms. Herron's Complaint, IVGID is a "government employer" as defined in NRS 288.060. Further, Ms. Herron, has appropriately alleged that she is a "local government employee" of IVGID as defined in NRS 288.050. Therefore, IVGID is clearly prohibited from discriminating against Ms. Herron for her political or personal affiliations pursuant to NRS 288.270.[1]

The facts alleged in Ms. Herron's Complaint clearly state that IVGID has engaged in a prohibited practice in violation of NRS 288.270. Therefore, the Board clearly has authority to take the Complaint before it. Finally, the Board may order IVGID to refrain from discriminating

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[1] The EMRB has adopted a formal definition of "personal reasons." *See Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of N. Las Vegas v. Glazier*, Case No. 50781 (unpublished 2010)). The EMRB, referencing Black's Law Dictionary, defined "personal reasons" as follows:

> Black's Law Dictionary defines "Personal" to mean "[appertaining to the person; belonging to an individual. . . " Black's Law Dictionary 702 (6th ed. 1991). Additionally, the term "political or personal reasons or affiliations" is preceded in NRS 288.270(1)(f) by a list of factors, "race, color, religion, sex, age, physical or visual handicap, national origin," that can best be described as "non-merit-or-fitness" factors, i.e., factors that are unrelated to any job requirement and not otherwise made by law a permissible basis for discrimination. The doctrine of ejusdem generis states that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to those things of the same general class as those enumerated. Black's Law Dictionary 357 (6th ed. 1991). **Thus, the proper construction of the phrase "personal reasons or affiliations" includes "non-merit-or-fitness" factors, and would include the dislike of or bias against a person which is based on an individual's characteristics, beliefs, affiliations, or activities that do not affect the individual's merit or fitness for any particular job.**

Id. **(emphasis supplied)**. Since 2005, this has been the definitive definition of discrimination based upon personal reasons. For a discussion of this special protection against discrimination, please see **Exhibit 1 (Bruce K. Snyder, "NEVADA'S SPECIAL DISCRIMINATION LAW FOR LOCAL GOVERNMENT EMPLOYEES) attached hereto.**

against Ms. Herron and may further order that Ms. Herron be restored any benefit she has been deprived as a result of the discrimination.

C. At this stage, the Board must assume that Ms. Herron has suffered an adverse employment action, therefore, summary dismissal is premature and inappropriate.

Respondent alleges that Ms. Herron's claim for discrimination fails as a matter of law because she did not suffer an adverse employment action. Respondent cites to *Davis v. Legal Services Alabama, Inc.* 19 F.4th 1261, 1266-67 (11th Cir. 2021) cert. denied 2024 WL 1839097 (Apr. 29, 2024).

In considering a motion to dismiss, all factual allegations in the complaint are recognized as true and all inferences are drawn in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P. 3d 670, 672 (2008).

Further, NRS 281.370 provides that:

> 1. All personnel actions taken by state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof must be based solely on merit and fitness.
>
> 2. State, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment or discriminate against any person in compensation or in other terms or conditions of employment because of the person's race, creed, color, national origin, sex, sexual orientation, gender identity or expression, age, **political affiliation** or disability, except when based upon a bona fide occupational qualification.

It is not just that Ms. Herron was *simply* placed on administrative leave. Ms. Herron was placed on leave without notice as to why she was being placed on leave. Further, she was not told how long the leave would last or what to expect while she was on leave. This leave was inexplicably extended for 14 weeks. Given Ms. Herron's senior position within the IVGID Senior team, this arbitrary and capricious adverse employment action was embarrassing and demeaning

and gave the impression that Ms. Herron had engaged in serious misconduct. However, after 14 weeks, it was finally concluded that Ms. Herron did not engage in misconduct of any kind.[2] As has been appropriately alleged within the Complaint, Ms. Herron has never, and in fact, no other IVGID employee has ever been placed on leave during an investigation. Further, the conduct of IVGID caused her severe emotional distress and caused her to fear that Trustees Sara Schmitz and Matthew Dent were attempting to use their positions as Trustees to have her terminated in retaliation for supporting the recall efforts against them.

Putting Ms. Herron under investigation based on frivolous secret allegations was blatant retaliation against Ms. Herron by certain IVGID Trustees and a member of Staff who, upon information and belief, pushed for this investigation due to their angst over Ms. Herron's "political or personal reasons or affiliations," in violation of her rights under state law. *See* NRS 281.370(1) and (2); NRS 288.270(1)(f) (for local government employers) and NRS 288.270(2)(c) (for local government employees and employee organizations).

Ms. Herron deserves to bring this matter and the facts before the Board to decide whether the leave was a "simple paid suspension" or if Ms. Herron's leave was exceptionally unreasonable or dilatory." *Jones v. Se. Pa. Transp. Auth.*, 796 F3d 323 (3d Cir. 2015). It would be premature, and it is inappropriate for the EMRB to view the facts at this stage in any other light than most favorable to Ms. Herron. The facts as alleged, if true, clearly show, that Ms. Herron was retaliated against and placed on leave solely because of her personal and political affiliations.

For the reasons stated above, the Board should not dismiss Ms. Herron's Complaint, and cannot at this stage summarily decide whether Ms. Herron suffered an adverse employment action.

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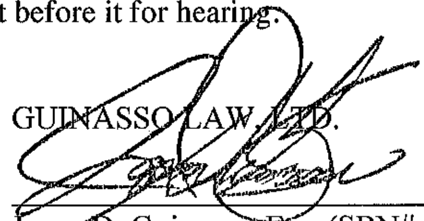
[2] Despite repeated requests for a copy of the investigation report and findings, IVGID has refused to produce the report, exonerating Ms. Herron for wrongdoing.

III. CONCLUSION

Respectfully, for the reasons stated above, the EMRB should DENY Respondent's Motion to Dismiss and should take Ms. Herron's Complaint before it for hearing.

Dated this 17th day of June, 2024.

GUINASSO LAW, LTD.

By: 

Jason D. Guinasso, Esq. (SBN# 8478)
Attorney for Complainant

CERTIFICATE OF SERVICE

Pursuant to NAC 288.200 (2), I caused a true and correct copy of the **OPPOSITION TO MOTION TO DISMISS** to be served on the following individuals by depositing for mailing with postage prepaid via certified U.S. mail on this 17th day of June, 2024:

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For Guinasso Law, Ltd.

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EXHIBIT 1

EXHIBIT 1

NEVADA'S SPECIAL DISCRIMINATION LAW FOR LOCAL GOVERNMENT EMPLOYEES

By Bruce K. Snyder[1]

Disclaimer: Please note that following is provided for informational purposes only. The information presented is not legal advice, is not to be acted on as such, and may not be current. You should contact an attorney to obtain advice with respect to any particular issue or problem. This outline is not intended to be and is not a substitute for the opinions of the Board. This outline shall not be cited to or regarded as legal authority.

I. Introduction

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.[2]

These are the words from the Civil Rights Act of 1866, the first federal law prohibiting discrimination based on race[3]. After passage of the Reconstruction Amendments[4], no further discrimination statutes were passed by Congress for almost a century. However, since 1964 a number of federal statutes have been enacted. The earliest of these was Title VII of the Civil

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[1] Commissioner, Local Government Employee-Management Relations Board (EMRB). The views and conclusions expressed herein are those of the author based upon his review of the law, regulations and decisions of the Board and are not necessarily those of the three-member EMRB. The EMRB, a Division of the Department of Business and Industry, fosters the collective bargaining process between local governments and their employee organizations (i.e., unions), provides support in the process, and resolves disputes between local governments, employee organizations, and individual employees as they arise.

[2] 42 U.S.C. § 1981.

[3] 42 U.S.C. § 1981.

[4] The Thirteenth, Fourteenth and Fifteenth amendments to the U.S. Constitution are commonly referred to as the Reconstruction Amendments.

Rights Act of 1964[5], which prohibits discrimination on the basis of race, color, religion, sex, or national origin.[6]

This was followed by the Age Discrimination in Employment Act of 1967, which prohibits similar discrimination for those at least forty years old.[7] Congress then passed the Rehabilitation Act in 1973, which prohibits discrimination on the basis of disability for employers who were recipients of federal grants or programs.[8] The capstone of the federal discrimination laws is the Americans With Disabilities Act of 1990, which also prohibits discrimination on the basis of disability, but which extends coverage to countless more employers.[9]

Since the passage of Title VII, not only did the federal government pass a number of laws prohibiting discrimination, but most states passed similar laws, thus creating a patchwork of laws and agencies administering them. Here in Nevada chief among the discrimination laws is the law administered by the Nevada Equal Rights Commission, which not only prohibits discrimination on the same bases as federal law, but which also prohibits discrimination on the basis of sexual orientation and gender identity or expression.[10]

But Nevada's general purpose discrimination statute is not the only such statute adopted by the Nevada legislature. The Local Government Employee-Management Relations Act[11] (EMRA) also has two provisions prohibiting discrimination for certain employees working in

[5] 42 U.S.C. § 2000e. *et seq.*

[6] 42 U.S.C. § 2000e-2(a).

[7] 29 U.S.C. § 621 *et seq.*

[8] 29 U.S.C. § 704 *et seq.*

[9] 42 U.S.C. § 12101 *et seq.*

[10] NRS 613.310 et seq. (first adopted by the Nevada legislature and signed into law in 1965).

[11] NRS 288.010 *et seq.*

Nevada. This paper discusses EMRA's discrimination provisions, comparing and contrasting them with the more widely known aforementioned statutes. The paper also discusses why an attorney might file a case under the EMRA in lieu of or in addition to other actions under these other statutes.

II. The Local Government Employee-Management Relations Act

The EMRA was originally enacted into law in 1969. Commonly known as the "Dodge Act", after State Senator Dodge, the law was a response to widespread picketing on the Strip by school teachers seeking better wages and working conditions.

A. EMRA's Prohibited Practices

As originally enacted into law, the EMRA did not contain any unfair labor practices. A number of unfair labor practices were added in 1971 by AB 178.[12] The EMRA was significantly amended in 1975 by AB 572.[13] The 1975 amendments eliminated the bargaining over "wages, hours, and conditions of employment"[14] and instead provided a laundry list of subjects of mandatory bargaining. Another change was to add a sixth type of prohibited practice to NRS 288.270(1):

> (f) Discriminate because of race, color, religion, sex, age, physical or visual handicap, national origin because of political or personal reasons or affiliations.[15]

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[12] Legislature, State of Nevada, Fifty-Sixth Session (1971). (Enacted into law as Chapter 643, the unfair labor practices were called prohibited practices by the statute. *See* NRS 288.270(1). Also enacted were unfair labor practices that could be committed by local government employees and employee organizations. *See* NRS 288.270(2).).

[13] Legislature, State of Nevada, Fifty-Eighth Session (1975). (Enacted into law as Chapter 539).

[14] NRS 288.150(1).

[15] Laws of Nevada, Fifty-Eighth Session, p. 924.

A similar provision prohibiting local government employees or employee organizations from committing acts of discrimination was also passed as part of the same amendments.[16] There is little legislative history for the bill, with only one reference to this provision:

> "The committee next discussed the last page of the bill. It was decided that the language should be "race, color, religion, sex, age, physical or visual handicap or national origin or because of political or personal reasons or affiliations."[17]

As currently constituted, there are six types of unfair labor practices affecting local governments and four types affecting local government employees and employee organizations.[18]

B. Jurisdictional Issues

The Local Government Employee-Management Relations Board (EMRB), which administers the EMRA, is a limited jurisdiction administrative agency.[19] NRS 288.110(2) reads in part:

> The Board may hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of this chapter by any local government employer, local government employee or employee organization.[20]

Accordingly, any complaint filed with the EMRB must allege that each party to the complaint is either a local government employer, local government employee or employee organization as the agency has no jurisdiction over any other entities.

The act defines each of the three entities over which it does have jurisdiction. A local government employer is:

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[16] *See* NRS 288.270(2)(c).

[17] *See* Minutes of the Assembly Government Affairs Committee, April 23, 1975, p. 3.

[18] For the full list see NRS 288.270(1) for the six types affecting local governments and NRS 288.270(2) for the four types affecting local government employees and employee organizations.

[19] *See, e.g.,* NRS 288.110(2).

[20] NRS 288.110(2).

> [A]ny political subdivision of this State or any public or quasi-public corporation organized under the laws of this State and includes, without limitation, counties, cities, unincorporated towns, school districts, charter schools, hospital districts, irrigation districts and other special districts.[21]

The EMRB currently has 170 local governments which annually file with the agency. There is a notable carve-out as the EMRB has held several times that courts are not local government employers.[22] Moreover, unlike various federal and state statutes that include employers who only meet a minimum threshold of employees, there is no minimum employee requirement for a local government employer to be a covered employer. Indeed, a number of Nevada's local governments have less than 15 employees.

A local government employee is "any person employed by a local government employer."[23] Here it must be noted that the employee need not be a member of an employee organization or even in a bargaining unit and yet not a member. Rather, the person must only be employed by a local government employer. Although there are no known cases involving hourly or part-time employees, the literal definition of local government employee would presumably include such persons. There are more than 80,000 local government employees in Nevada.

Finally, the term "employee organization" (i.e., union) is defined as "an organization of any kind having as one of its purposes improvement of the terms and conditions of employment of local government employees."[24] Here, it should be noted that the employee organization need not

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[21] NRS 288.060.

[22] See, e.g., *Clark County Deputy Marshals Assoc. v. Clark County*, Item No. 793 (2014); *In the Matter of the Petition for Recognition by the Clark County Deputy Sheriff Bailiff's Assoc.*, Item No. 504A (2002); *Washoe County Probation* Employees' Assoc. v. Washoe County, Item No. 334, (1994); and Operating Engineers Local #3 v. County of Lander, Item No. 346A (1995).

[23] NRS 288.050.

[24] NRS 288.040.

be recognized by the local government employer.[25] The EMRB currently has more than 200 employee organizations which annually file with the agency.

C. Procedural Issues

A complaint must be filed within six months from the date of the occurrence which is the subject of the complaint.[26] The Respondent then has 20 days to file an answer or dispositive motion once it is served by certified mail.[27] All parties are then required to file pre-hearing statements 20 days after the filing of the answer.[28] Once all the documents have been filed and any dispositive motions resolved by the Board, the case then enters a queue of cases waiting for a hearing date. Once the Board decides to hear a case, it must begin the hearing within 180 days.[29] Once a hearing date has been assigned, a Notice of Hearing is issued and a pre-hearing conference held.[30]

The EMRB has no provisions for discovery. It does, however, require parties to exchange proposed exhibits five days prior to the pre-hearing conference[31] and the pre-hearing statements

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[25] *See UMC Physicians v. Nev. Serv. Empl. Union*, 124 Nev. 84, 178 P.3d 709 (2008).

[26] NRS 288.110(4). Though outside the scope of this paper, this statute of limitations recognizes several so-called exceptions. Foremost, the limitations period does not run until the complainant receives unequivocal notice of a final adverse decision. *City of North Las Vegas v. EMRB*, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011). The EMRB also recognizes the doctrine of equitable tolling, *see, e.g., Frabbiele v. City of North Las Vegas*, Item No. 680I (2014), as well as forgiveness to a party that brings a timely complaint, but does so before a court that lacks jurisdiction. *See, e.g., Simo v. City of Henderson and Henderson Police Officers Assoc.*, Item No. 796 (2014).

[27] NAC 288.220.

[28] NAC 288. 250.

[29] NRS 288.110(2). If the case also has an allegation of bad faith bargaining, then the hearing must begin within 45 days. This is a new requirement contained in SB 241 (2015).

[30] NAC 288.273.

[31] NAC 288.273.

contain lists of witnesses.[32] The EMRB does have subpoena authority and witnesses can be required to bring pertinent documents with them to the hearing.[33]

D. Remedies Available

The EMRB may order any person found to have committed an unfair labor practice to refrain from the action complained of or to restore to an aggrieved party any benefit of which he/she may have been deprived.[34] The former is usually done by requiring the employer to post a notice to its employees. The latter includes restoration of the job and the awarding of back pay and benefits.[35] The Board may not go beyond restoring the status quo when ordering a remedy and does not have the ability to issue punitive damages.[36] The Board, however, can award attorneys' fees and costs to the prevailing party.[37]

III. Bases of Discrimination

A. Traditional Bases of Discrimination

As previously mentioned, the EMRA prohibits discrimination on the basis of race, color, religion, sex, and national origin.[38] These are the same prohibitions under the Civil Rights Act of 1964 and the Nevada Equal Rights Act.

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[32] NAC 288.250.

[33] NAC 288.279.

[34] NRS 288.110(2).

[35] *See, e.g., Reno Police Protective Assoc. v. City of Reno*, 102 Nev. 98, 102, 715 P.2d 1321, 1324 (1986).

[36] *See Nev. Serv. Empl. Union v. Orr*, 121 Nev. 675, 119 P.3d 1259 (2005).

[37] NRS 288.110(6).

[38] NRS 288.270(1)(e) and NRS 288.270(2)(c).

The EMRA also prohibits discrimination on the basis of age.[39] It must be noted that unlike the Age Discrimination in Employment Act, the Local Government Employee-Management Relations Act has no definition of age. Presumably the Board might follow the dictates of federal law and define discrimination on the basis of age to only affect covered employees over forty years of age; but to-date there has been no decision on point. Thus the possibility exists for an attorney to make a case that an employee may have been the subject of discrimination because he/she was too young.

Finally, under the traditional bases of discrimination the EMRA also prohibits discrimination on the basis of some disabilities. Unlike the Americans With Disabilities Act, the Local Government Employee-Management Relations Act only covers "handicaps" that are physical or visual.[40]

Based upon a prior ruling by the Board, discrimination based upon sexual orientation is specifically excluded and not subsumed under the category of discrimination based upon sex.[41] However, as detailed below, a claim for sexual orientation discrimination may possibly be pled as discrimination based on personal reasons.

How do the discrimination provisions of NRS 288 interact with those of federal and state law? In *Balisquide v. Las Vegas Valley Water District*, the Respondent filed a motion to dismiss, claiming the case should instead be heard by the Nevada Equal Rights Commission.[42] The Board denied the motion, stating that the claims were made under NRS 288 and that, therefore, the

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[39] *Id.*

[40] *Id.*

[41] *See Heitzinger v. Las Vegas-Clark County Library District*, Item No. 782C (2012).

[42] *Balasquide v. Las Vegas Valley Water District*, Item No. 708 (2009), 1.

Board had jurisdiction to hear the case. [43] The decision noted that the Board does not have jurisdiction over federal claims of discrimination but that the discrimination provisions of NRS 288 are independent of any federal or state claims.[44]

1. Standard and Proof

The Board often looks to federal and state law in its decisions, and in particular, to decisions rendered by the courts on the interpretation of those statutes. Nowhere is this more evident than when the Board uses the traditional *McDonnell Douglas* framework.[45] Under this framework the Complainant must show a *prima facie* case of discrimination. This is done by showing the employee (1) belongs to a protected class; (2) they were qualified for the position and/or were performing satisfactorily; (3) that the employee was subjected to an adverse employment action; and (4) that similarly situated employees not in the employee's protected class received more favorable treatment.[46]

Once the Complainant makes the showing of a *prima facie* case the burden then shifts to the Respondent to articulate a legitimate non-discriminatory reason for its actions.[47] This burden, which shifts to the Respondent, only requires the Respondent to rebut the presumption of

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[43] *Id.* at 2.

[44] *Id.* at 2 (citing Kilgore v. City of Henderson, Item No. 550H (2005) and Harrison v. City of North Las Vegas, Item No. 558 (2003), (Both supporting the proposition that the Board does not have jurisdiction over claims arising out of any other law but that this does not prevent the EMRB from having jurisdiction over its own statute).

[45] *See, e.g., McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). (All of the cases filed with the EMRB have alleged disparate treatment. None have alleged a disparate impact theory of discrimination). *See also Apeceche v. White Pine County*, 96 Nev. 723, 726, P.2d 975, 977 (1980) for a Nevada Supreme Court decision using the same framework as *McDonnell-Douglas*.

[46] *Id.* This framework need not be employed when there is direct evidence of discrimination.

[47] *Id.*

discrimination.[48] If the Respondent meets this burden, then the burden shifts back to the Complainant to show that the proffered reason articulated by the Respondent is pretextual.[49]

2. Examples of Discrimination Cases Based on Traditional Bases

In 2005 the Las Vegas Police Protective Association Civilian Employees filed a complaint against the Las Vegas Metropolitan Police Department, alleging that the police department had violated NRS 288.270(1)(f) by discriminating against the Law Enforcement Support Technicians (LEST's) by restricting their ability to transfer to another position to a greater degree than that of other civilian employees.[50] The police department filed a Motion to Dismiss, claiming that the LEST's were not a protected class under NRS 288.270(1)(f).[51] The Board agreed that Respondent had treated the LEST's differently than other civilian employees but noted that this was not discrimination based upon any of the enumerated categories in NRS 288.270(1)(f) and therefore granted the motion.[52] In essence, the job classification of LEST is not a protected class.

Officer Boykin was a probationary police officer who worked for the City of North Las Vegas. He was non-confirmed after being accused of violating the Department's policy on truthfulness.[53] Boykin made several claims, including that he had been terminated due to his race, African-American. Finding that Boykin had made a *prima facie* case, the burden then shifted to the City to offer a legitimate, non-discriminatory reason for its actions. To this end the

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[48] *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981).

[49] *McDonnell Douglas*, 411 U.S. 792.

[50] *Las Vegas Police Protective Association v. Las Vegas Metropolitan Police Department*, Item No. 620 (2006).

[51] Id. at 1.

[52] Id, at 3.

[53] *Boykin v. City of North Las Vegas*, Item No. 674E (2010), 2.

City offered that Boykin had violated the policy on truthfulness, which then shifted the burden back to the Complainant. In this case the Board did "not find credible substantial evidence to support a finding that the City's legitimate reason was pre-text for racial discrimination.[54]

In 2013 the Board issued an order in the case of Ajay Vakil v. Clark County in which Mr. Vakil, an engineer, alleges the County discriminated against him on the basis of his age, 63, when the County laid him off as a result of the Great Recession.[55] Again applying the burden shifting test, the Board found that Vakil had made a *prima facie* case. The County's offered legitimate non-discriminatory reason was that it laid employees off solely on the basis of seniority and produced evidence to support that assertion. The Board then went on to state that Mr. Vakil did not present any evidence refuting the County's explanation and thus found in favor of the County.[56]

Finally, Pamela Vos was a Senior Corrections Officer for the City of Las Vegas. The Senior Corrections Officers (among other employees) were laid off in 2010. At that time she elected not to bump back to her prior Corrections Officer position.[57]After losing her job, Vos then filed a complaint alleging her union breached its duty of fair representation and that the City had violated a number of federal and state laws, discriminated against her on the basis of her age and race (white), discriminated on the basis of personal reasons, committed bad faith bargaining, and committed breach of contract. With respect to her age and race discrimination claims, the Board held Vos did not make out a *prima facie* case in that she could not point to any employee

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[54] *Id.* at 7-8. It should be noted that Boykin was reinstated to his prior status of suspended with pay pending an investigation, which was based on other counts in the complaint.

[55] *Vakil v. Clark County*, Item No. 768A (2013), 6.

[56] *Id.* at 7-8.

[57] *Vos v. City of Las Vegas and Las Vegas Peace Officers Association*, Item No. 749 (2014), 2-3.

in her job classification who was treated more favorably than her. Moreover, the City had applied the layoffs according to the contractual terms of using seniority.[58]

B. Discrimination Based Upon Personal Reasons or Affiliations

The EMRA also prohibits discrimination on the basis of "political or personal reasons or affiliations."[59] This prohibition is unique among both the National Labor Relations Act and all state acts affecting public sector employees. This leads to the issue of what is meant by the phrase "political or personal reasons or affiliations." In 1959 the State of Nevada passed a law requiring that all actions concerning personnel are to be based on merit and fitness. This law was expanded over time. Sections 1 and 2 currently state:

> 1. All personnel actions taken by state, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof must be based solely on merit and fitness.
>
> 2. State, county or municipal departments, housing authorities, agencies, boards or appointing officers thereof shall not refuse to hire a person, discharge or bar any person from employment or discriminate against any person in compensation or in other terms or conditions of employment because of the person's race, creed, color, national origin, sex, sexual orientation, gender identity or expression, age, political affiliation or disability, except when based upon a bona fide occupational qualification.[60]

Although not explicitly referenced elsewhere one might conclude that this law was the genesis for the EMRA's inclusion of a prohibition of discrimination based on political or

[58] *Id.* at 9. (The Board found all her other claims were without merit and specifically noted that it did not have jurisdiction over any alleged federal or state law violations).

[59] NRS 288.270(1)(f) (for local government employers) and NRS 288.270(2)(c) (for local government employees and employee organizations).

[60] NRS 281.370(1) and (2).

personal reasons or affiliations in that the EMRA covers some of the same public sector employees as NRS 281.370 and also includes a prohibition on political affiliations.

Over time the Board has adopted a formal definition of "personal reasons". Noting that the legislative history did not indicate any reasoning or intent behind the 1975 amendment adding discrimination prohibitions, the Board then stated "we are left with the task of determining, in the context of this case. . . the meaning of 'personal reasons or affiliations.'"[61]

The Board then referred to Black's Law Dictionary, stating:

> Black's Law Dictionary defines "Personal" to mean "[appertaining to the person; belonging to an individual. . . " Black's Law Dictionary 702 (6th ed. 1991). Additionally, the term "political or personal reasons or affiliations" is preceded in NRS 288.270(1)(f) by a list of factors, "race, color, religion, sex, age, physical or visual handicap, national origin," that can best be described as "non-merit-or-fitness" factors, i.e., factors that are unrelated to any job requirement and not otherwise made by law a permissible basis for discrimination. The doctrine of *ejusdem generis* states that where general words follow an enumeration of particular classes of things, the general words will be construed as applying only to those things of the same general class as those enumerated. Black's Law Dictionary 357 (6th ed. 1991). Thus, the proper construction of the phrase "personal reasons or affiliations" includes "non-merit-or-fitness" factors, and would include the dislike of or bias against a person which is based on an individual's characteristics, beliefs, affiliations, or activities that do not affect the individual's merit or fitness for any particular job.[62]

Since 2005 this has been the definitive definition of discrimination based upon personal reasons.[63]

1. Standard and Proof

[61] *See Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of North Las Vegas v. Glazier*, Case No. 50781 (unpublished 2010)).

[62] *Id.* at 9.

[63] *See Kilgore v. City of Henderson*, Item No. 550H (2005) (approved by the Nevada Supreme Court in *City of North Las Vegas v. Glazier*, Case No. 50781 (unpublished 2010)).

Unlike cases brought for traditional bases of discrimination, in which the EMRB has always employed the *McDonnell Douglas* analysis[64], the analysis of cases brought for political or personal reasons or affiliations has varied over time. As detailed below, the EMRB used to employ the *McDonnell Douglas* test but since the *Bisch*[65] case in 2013 has used a modified *Wright Line* burden shifting test.[66] In *Bisch* the Board cited to a previous decision in *Reno Police Protective Assoc. v. City of Reno*, in which it concluded that a Complainant must first present credible evidence that protected conduct was a motivating factor in Respondent's actions. If so, the burden then shifts to the Respondent to prove by a preponderance of the evidence that it would have taken the same against even in the absence of any protected conduct. The employee may then offer evidence that the proffered reason is pretextual.[67] In *Bisch* the Court then adopted this standard for resolution of personal and/or political reasons cases.[68]

Most of the cases brought to-date have alleged personal reasons or affiliations. These are first discussed below, followed by the political reasons cases.

2. Examples Where Discrimination Was Substantiated

The first Board decision on the basis of personal reasons was not issued until 1988. In that case three Clark County juvenile officers assigned to Child Haven had received written reprimands after two children had run away. In that case the Board employed the *McDonnell*

[64] *See McDonnell Douglas*, 411 U.S. 792.

[65] *Bisch v. Las Vegas Metropolitan Police Department*, 302 P. 3d 1108 (Nev. 2013).

[66] *National Labor Relations Board v. Wright Line*, 662 F.2d 899 (1981).

[67] *See Bisch v. Las Vegas Metropolitan Police Department*, 302 P.3d 1108 (Nev. 2013). (*citing Reno Police Protective Assoc. v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986). (The confusion over the standard remains to this day. For instance, post-hearing briefs filed by both attorneys in a case alleging personal reasons discrimination both use the McDonnell-Douglas framework).

[68] *Id.*

Douglas tripartite analysis.[69] One employee, a supervisor, claimed he received a reprimand because he would not go along with the discipline meted out against the other two employees. A second employee claimed there was personal animus against him because he had cooperated with the police in an investigation at Child Haven and that his cooperation had maligned management. A third employee claimed he was disciplined because of his association with the second employee.[70] In the end, the Board concluded that the proffered reasons as put forth by the County were pretextual, primarily because the children who had escaped were not under the supervision of the employees and that conversely those more directly responsible were not disciplined.[71]

The following year the Board decided a case involving Frank Kay, an employee who worked for Lyon County.[72] He claimed that he was the subject of personal animus by his supervisor after he had traded with his supervisor an alternator that did not work, who then held that action against him.[73] Kay specifically noted that his supervisor thereafter refused to talk to him, give him multiple simultaneous assignments, would not allow Kay to talk at work, and that other employees were not to associate with Kay, among other things.[74] At the hearing witnesses for the county gave conflicting reasons for Kay's termination, including abuse of sick leave, filing a false document, and not following instructions.[75] The Board noted that not only was Kay able to show that the reasons were pretextual but that the conflicting reasons themselves gave

[69] McDonnell Douglas, 411 U.S. at 802.

[70] *Clark County Public Employees Assoc. v. County of Clark*, Item No. 215 (1988), p. 4-5.

[71] *Id.* p. 10.

[72] *Stationary Engineers, Local 19 and Frank Kay v. County of Lyon*, Item No. 231 (1989).

[73] *Id.* at 4.

[74] *Id.* at. 4-5.

[75] *Id.* at. 5-6.

them pause as to their credibility.[76] Note that by finding the reasons pretextual the Board was using a form of the *McDonnell Douglas* test.[77]

In 1991 the Board decided a case between the Esmeralda County Classroom Teachers Association and the Esmeralda County School District, in which the school district refused to retain a teacher who submitted her signed contract for the upcoming year to the school district three days late.[78] The teacher claimed that the Superintendent first retaliated against her for having testified on behalf of another teacher at an arbitration hearing and for being the chair of the negotiating team and secondly that the Superintendent had discriminated against her for personal reasons as an outgrowth of those actions.[79] With respect to the discrimination allegation, the Board noted it was apparent that the Superintendent disliked her based on the statements he made about her at the Board's hearing, noting he obviously did not approve of her and considered her to be a troublemaker.[80]

Thomas Glazier was a long-term police officer for the City of North Las Vegas. While employed with North Las Vegas, Glazier's wife, Laura, had an affair with Captain Scott who was in Glazier's chain of command.[81] During this time Glazier applied for the position of Lieutenant. In this instance the appointment process was changed and Scott ended up serving on

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[76] *Id.* at 5-7.

[77] Likewise in *Fraley v. City of Henderson and Henderson Police Officers Association*, Item No. 547 (2004), the Board found Respondent City's reason pretextual and thus found in favor of the Complainant without ever explicitly referring to *McDonnell Douglas*.

[78] *Esmeralda County Classroom Teachers Assoc. v. Esmeralda County School District*, Item No. 273 (1991), p. 3.

[79] *Id.* At 2-3.

[80] *Id.* at 7.

[81] *Glazier v. City of North Las Vegas*, Item No. 624A (2007), 13.

Glazier's oral examination board.[82] Even so, Glazier placed high on the appointment list but was never hired as a Lieutenant.[83] Later Scott's days off and rate of pay were changed. Scott also participated in a discipline that Glazier received.[84] Testimony revealed that the Chief of Police knew of the affair and yet did nothing to stop it.[85] In this case the Board found that Glazier had been denied a promotion based on discrimination for personal reasons.[86] It is important to note that nowhere in this case does it cite the legal standard for personal reasons discrimination. Rather, the decision just declares that the acts recited amount to discrimination based on personal reasons.

3. Examples Where Discrimination Was Not Substantiated

In 1994 the Board decided a case filed by the Water Employees Association against the Las Vegas Valley Water District on behalf of Ron Rivero, an employee who had been quite active in the union, including his serving as its President.[87] Rivero claimed he had been terminated both because of his union involvement and for personal reasons.[88] Noting that the Complainant had made a *prima facie* case the Board then assessed the legitimate, nondiscriminatory reason offered by the employer; namely that Rivero had not received his federally mandated Commercial Driver's License for one year after first being required to do so

[82] *Id.*

[83] *Id.* at 13.

[84] *Id.* at 14.

[85] *Id.* at 15.

[86] *Id.* at 14.

[87] *Water Employees Association v. Las Vegas Valley Water District*, Item No. 326 (1994), p. 1.

[88] *Id.* at 2.

and after being offered numerous assistance during that year.[89] The Board then noted that the "ultimate burden of persuading the trier of facts that the Respondent intentionally discriminated against the Complainant remains at all times with the Complainant."[90] The Board then went out to hold that the Complainant had not met his burden to prove that the employer's proffered reason was pretextual.[91] This case obviously employed the *McDonnell Douglas* test.[92]

The Board decided a key case with respect to alleged discrimination on the basis of personal reasons in 2005.[93] Kilgore, who had been a union President and who was ultimately terminated, claimed his termination was in violation of both NRS 288.270(1)(a), for his union involvement, and in violation of NRS 288.270(1)(f), for discrimination based upon personal reasons.[94] As mentioned previously, it was this case in which the Board analyzed the legislative history behind the 1975 amendments.[95] The Board thereupon applied the *McDonnell Douglas* test and found that the City of Henderson had legitimate, non-discriminatory reasons for its termination of Kilgore. These included leaving the jurisdiction while on duty, repeated tardiness, repeated absences, use of a City vehicle for personal use, unauthorized use of a cemetery prop, failing to respond to calls, unauthorized excuse from mandatory shooting qualifications, etc.[96]

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[89] *Id.* at 4.

[90] *Id.* (referencing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

[91] *Id.*

[92] See also *Bott v. City of Henderson,* Item No. 560A (2005), in which the decision and order of the Board details over two pages the *McDonnell Douglas* framework, citing a litany of supporting cases involving this framework.

[93] *See Kilgore v. City of Henderson*, Item No. 550H (2005).

[94] *Id.* at 1. (This analysis only covers the claim based upon personal reasons).

[95] *Id.* at 8-9..

[96] *Id.* at 11-18.

Leon Greenberg was an applicant for an Attorney I position with Clark County, who filed two complaints against the County when he was not hired for that position. He claimed several violations of the EMRA, including discrimination based on NRS 288.270(1)(f).[97] Greenberg offered into evidence his "outstanding qualifications", that there had been a delay in grading his application, and that the County continued to recruit for the position after he had submitted his application, among other reasons.[98] The Board granted the County's Motion to Dismiss, noting several times that Complainant had failed to allege anything "more than a bare suspicion" that he was not hired for unlawful reasons and that the complaint cannot rest on mere suspicion but must make a *prima facie* case showing sufficient to support an inference that the employer's conduct was motivated by an unlawful reason.[99]

The case involving Cynthia Thomas is interesting in that it shows the interplay between grievance arbitration and the resolution of complaints filed with the EMRB. Thomas was discharged by the Las Vegas Metropolitan Police Department after having made an unauthorized inquiry of criminal history on a politician and for being untruthful about the incident.[100] Her grievance ultimately went to binding arbitration, where she lost. Thereupon the employer filed a Motion to Dismiss her separate EMRB complaint, requesting that the Board defer to the arbitrator.[101] The Board accordingly reviewed the five-factor test as to whether they should defer to the arbitrator and ultimately decided to accept the facts as determined by the arbitrator and then apply those facts to a *McDonnell-Douglas* analysis of Thomas' personal reasons claim of

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[97] *Greenberg v. Clark County*, Item No. 577C (2005), 3.

[98] *Id.*

[99] *Id.* at 6-7.

[100] *Thomas v. Las Vegas Metropolitan Police Department*, Item No. 588 (2005), 7.

[101] *Id.* at 1.

discrimination.[102] Upon reviewing the evidence as determined by the arbitrator, the Board then decided that LVMPD met its burden of production under *McDonnell-Douglas* and dismissed the complaint.[103]

Ron Williams was a police officer who worked for the Las Vegas Metropolitan Police Department, which had suspended him for 120 hours for driving a department vehicle after he had been drinking. Williams' complaint alleged he had a disability, alcoholism.[104] LVMPD filed a Motion to Dismiss, claiming that Williams would not be protected under the Americans With Disabilities Act.[105] Williams' Reply stated that the discrimination fell under "personal reasons."[106] The Board granted the Motion to Dismiss, but not on the grounds sought by LVMPD. The Board first noted that it only had jurisdiction under NRS 288 and not under federal law.[107] It then applied the definition of "personal reasons" as anything not related to merit or fitness of duty and determined that Williams had not met his burden as consuming alcohol and then driving an employer's vehicle adversely affected his ability to carry out his work.[108] This case is important as it shows both the interplay between NRS 288 and federal law as well as how personal reasons can be used as a "catch-all" category of discrimination.

The *Larramendy* case is an example where an employee did not make out a *prima facie* case of discrimination. In 2005 Larramendy's job classification was changed. When this

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[102] *Id.* at 5-6.

[103] *Id.* at. 9 (since the Board considered the evidence as determined by the arbitrator it actually treated the Motion to Dismiss as a Motion for Summary Judgment).

[104] *Williams v. Las Vegas Metropolitan Police Department*, Item No. 619 (2006), 1.

[105] *Id.*

[106] *Id.* at 1-2.

[107] *Id.* at 7.

[108] *Id.* at 8.

occurred the City of Las Vegas did not include in her classification seniority time spent in a prior classification.[109] In 2010 she noticed the time was not included and thereupon filed a grievance, which the City refused to process, claiming it was untimely.[110] She thus filed a complaint, alleging that the City's refusal to process the grievance was discrimination based on personal reasons.[111] In its decision the Board stated that all the evidence did not support an inference that discrimination for personal reasons was a motivating factor.[112]

Just as in Larramendy Daniel Jennings also did not make out a *prima facie* case. Jennings was a newly-promoted Lieutenant in the Boulder City police department, who disagreed with the Police Chief as to assigning a certain officer to head up a warrant unit.[113] Unbeknownst to the Police Chief this heated discussion had been surreptitiously taped by Jennings. When this fact came out Jennings was demoted back to Sergeant and suspended.[114] Jennings thereupon claimed personal reasons discrimination. The Board disagreed. At the hearing Jennings stated his claim for discrimination rested on his disagreement over whether a certain officer should head the warrant unit.[115] The Board found that the incident was job-related and not based on any characteristic, belief, affiliation or activity unrelated to merit or fitness for duty.[116]

C. Discrimination Based Upon Political Reasons or Affiliations

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[109] *Larramendy v. City of Las Vegas*, Item No. 741A (2011), 5.

[110] *Id.* at 6.

[111] *Id* at. 1.

[112] *Id.* at 7.

[113] *Jennings v. City of Boulder City*, Item No. 780 (2012), 2.

[114] *Id.* at 4.

[115] *Id.* at 5.

[116] *Id.* at 6.

There have only been two substantive decisions that alleged discrimination based upon political reasons or affiliations. The standard of proof is that modified *Wright Line* standard (see III.B.1 above) that was approved by the Nevada Supreme Court.[117]

The first case was Bisch v. Las Vegas Metropolitan Police Department and Las Vegas Police Protective Association.[118] Bisch claimed that her union discriminated against her based on political reasons when it did not provide a representative at an investigatory hearing, despite her having her own private attorney present[119], and that her union did so because she was a candidate for sheriff and that the union instead was supporting another candidate.[120] The Board stated that the union presented substantial evidence that it had been the policy of the union not to provide concurrent representation and that this policy had been uniformly applied. Therefore, it denied the claim against Bisch.[121]

With respect to her employer, Bisch claimed that she had been disciplined because of her running for sheriff. Here the Board found that Bisch had provided sufficient evidence raising an inference of political discrimination.[122] However, the Board then concluded that LVMPD would

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[117] *Bisch v. Las Vegas Metropolitan Police Department*, 302 P. 3d 1108 (Nev. 2013).

[118] *Bisch v. Las Vegas Metropolitan Police Department and Las Vegas Police Protective Association*, Item No. 705B (2010). (The employee raised a number of claims but the two relevant ones here are allegations of discrimination based on political reasons against both her employer and employee organization).

[119] *Id.* at 3.

[120] *Id.* at 8.

[121] *Id.*

[122] *Id.* at 9.

have issued the same discipline against Bisch regardless of any political activity.[123] The Board thereupon dismissed also dismissed this claim of discrimination.

The other political discrimination case also involved the Las Vegas Metropolitan Police Department.[124] O'Leary was a captain who had worked at Metro for almost 25 years with a clean record. In the summer of 2013 he was approached by a friend, DJ Ashba, the lead guitarist for Guns N' Roses, who was looking for a helicopter ride to the Grand Canyon for part of a marriage proposal to his girlfriend. O'Leary learned that a private company could not do this. However, an employee in Metro's air unit volunteered a fly-along for this purpose as the department had done a number of fly-alongs for individuals. A few days after the fly-along Ashba posted a statement on social media about the event. The story ended up going viral. That same day O'Leary received a telephone call from his immediate supervisor about the posting.[125]

Metro alleged that O'Leary had acted inappropriately in arranging the fly-along, among other things. After refusing requests to resign, O'Leary later was only sustained that the fly-along brought discredit to the department and that he used his department vehicle to transport passengers. In December O'Leary was again asked to resign or else be demoted. O'Leary thereupon resigned.[126] Later he claimed a unilateral change and discrimination based on political or personal reasons. The Board denied the unilateral change allegation as Metro's breach was an isolated incident. However, the Board agreed that O'Leary was discriminated against for political

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[123] *Id.* (Bisch had been disciplined for taking a neighbor's daughter that had been bitten by her dog to an urgent care facility and then claiming to staff that the neighbor's daughter was her daughter and filing an insurance claim related under this false pretense).

[124] *O'Leary v. Las Vegas Metropolitan Police Department*, Item No. 803 (2015) (This case is currently in District Court under a Petition for Judicial Review).

[125] *Id.* at 15-16.

[126] *Id.* at 16-17.

reasons;[127] namely the fallout from the social media posting and how that affected the department's attempt to get the More Cops tax passed. Specifically, applying the test as enunciated by the Nevada Supreme Court in the *Bisch* case (see III.B.1 above) the Board found that LVMPD had not met its burden of proof to show that it would have taken the same action against the Complainant in the absence of the political reasons as detailed in the case.[128] O'Leary was thereupon reinstated with back pay.

IV. Why File a Complaint for Discrimination with the EMRB?

Filing a discrimination claim with the U.S. Equal Employment Opportunity Commission or the Nevada Equal Rights Commission does have its advantages. First, both agencies will investigate the allegations, thus giving the Complainant (and his/her attorney) and independent opinion on the allegations. Secondly, at the conclusion of the investigation the Complainant can receive the investigatory file, thus providing a fair amount of "discovery" on the case. Thirdly, if and when a case if filed in court the Complainant also has the ability to conduct further discovery in the form of interrogatories, requests for admissions, requests for the production of documents and from the taking of depositions.

However, there are also significant disadvantages in using the above process. Foremost is the cost. There are filing fees and depositions can run into the thousands of dollars. Also, both the investigation period and the time spent in court can consume years of litigation.

If the client is a local government employee the EMRB can be a useful alternative. First, there are no filing fees. Secondly, pre-hearing discovery is not allowed. Thus there are no depositions or written discovery, also reducing the cost. Secondly, cases filed with the EMRB

[127] *Id.* at 19.

[128] *Id.*

are often heard more quickly. A typical case from the filing of a complaint to resolution by the Board usually takes about a year.[129]

It should be noted that many cases do not require a lot of discovery as the Complainant may already possess needed evidence. Additionally, there are workarounds to the lack of discovery. For instance, needed records may be obtained through the Public Records Act[130] since local governments are public agencies subject to that act. Also, a number of cases filed with the EMRB also involve the filing of a grievance, which may have ultimately ended in arbitration. Much documentary and testamentary evidence can be obtained through the arbitration record.

V. Conclusion

Nevada local government employees have an additional discrimination law available to them to redress alleged discriminatory actions taken against them by their local government employers. Unique among other laws is the provision allowing for claims based on political or personal reasons or affiliations. Compared to litigating in federal or state court, the process with the EMRB can be both less expensive and also quicker. The process may not be best for a case needing significant discovery. However, attorneys representing local government employees should consider this alternative, especially when a client may have limited funds for litigation.

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[129] The agency is under a mandate to conduct a hearing within seven months of the filing of the pre-hearing statement, which takes place about two months after the filing of the complaint. This mandate is set to be reduced by one month per year in future years.

[130] NRS 239.001 et seq.

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

SUSAN HERRON,

Complainant,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

Respondent.

Case No.: 2024-015

RESPONDENT'S REPLY TO COMPLAINANT'S OPPOSITION TO MOTION TO DISMISS

Respondent Incline Village General Improvement District ("Respondent"), by and through its attorney of record, Nick D. Crosby, Esq. of Marquis Aurbach, hereby files its Reply to Complainant's Opposition to Motion to Dismiss in the above-referenced matter. This Reply is made and based upon the Memorandum of Points and Authorities, the pleadings and papers on file herein and any oral argument allowed by counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Opposition incorrectly interprets the Respondent's arguments regarding Nevada Revised Statute 288.280 and completely fails to address the arguments related to the inapplicability of Nevada Revised Statute 281.370. As such, the Motion to Dismiss must be granted with respect to these two issues. Furthermore, the Opposition does not provide cogent authority or argument to salvage the Complaint from dismissal regarding Complainant's Nevada Revised Statute 288.270 claim because, as is the case in the Complaint, the Opposition does not

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articulate a legally recognized adverse employment action necessary to maintain a claim for discrimination under the statute. As such, the Motion to Dismiss must be granted.

II. LEGAL ARGUMENT

A. THE OPPOSITION INCORRECTLY CONSTRUES THE ARGUMENTS ADVANCED IN THE MOTION *VIS A VIS* NEVADA REVISED STATUTE 288.280.

The Complaint specifically lists Nevada Revised Statute 288.280 as a basis for the first cause of action for discrimination. (Compl., p. 6:21-24). The problem for Complainant, however, is that the specific statute cited does not include any protections against discrimination. *See* Nev. Rev. Stat. 288.280. The Opposition appears to argue that Respondent believes there is no prohibition of discrimination in chapter 288 – this is not the case. Respondent readily acknowledges Nevada Revised Statute 288.270 contains anti-discrimination language. However, Nevada Revised Statute 288.280 *does not*. Instead, as argued in the Motion, Nevada Revised Statute 288.280 simply provides that matters concerning prohibited practices can be submitted to the Board and outlines the statutory timeframe in which the matter must be heard. *See* Nev. Rev. Stat. 288.280. It contains no substantive rights and, as such, cannot be a stand-alone basis for redress by an aggrieved party. Contrary to the argument advanced by the Complainant in the Opposition, the Board need not look to the totality of the Employee Management Relaitons Act ("EMRA") – Nevada Revised Statute 288.280 does not provide a *substantive* right to an aggrieved party. Rather, it only contains *procedural* rights. As such, the Board should issue a decision dismissing Complainant's First Cause of Action as it relates to Nevada Revised Statute 288.280.

B. THE COMPLAINANT DID NOT OPPOSE RESPONDENT'S ARGUMENTS REGARDING THE INAPPLICABILITY OF NEVADA REVISED STATUTE 281.370.

As this Board is aware, and as argued in the Motion to Dismiss, the Board's "authority is limited to matters arising out of the interpretation of, or performance under, the provisions of the [EMRA]." *See e.g., Water Employees Ass'n of Nev. v. Las Vegas Valley Water Dist.*, Case No. 2019-002, Item No. 841 (June 2019) (citing NRS 288.110(2) and *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 895, 59 P.3d 1217 (2002); *see also*, *Local Gov't Employee-*

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Management Relations Bd. v. Gen. Sales Drivers, Delivery Drivers and Helpers, Teamsters Local Un. No. 14 of Intern. Broth. of Teamsters, Chauffeurs, Warehouseman and Helpers of Amer., 98 Nev. 94 (1982)). Nevada Administrative Code 288.410(1)(d) permits the Board to refuse to issue a declaratory order if "[t]he matter is not within the jurisdiction of the Board." Nev. Admin. Code 288.410(1)(d). There is no question, as a matter of law, the Board's jurisdiction is limited to claims arising under Chapter 288 and, as such, Nevada Revised Statute 281.370 is not within the Board's jurisdiction. Complainant did not address this argument in her Opposition and, therefore, any claim arising under Nevada Revised Statute 281.370 must be dismissed.

C. THE COMPLAINANT DID NOT, AS A MATTER OF LAW, SUFFER AN ADVERSE EMPLOYMENT ACTION.

In the Opposition, the Complainant argues the adverse employment action she suffered was being placed on administrative leave without notice as to why, how long she would be on leave, or "what to expect while she was on leave." (Opp. at p. 6:23-25). Complainant argues she "deserves to bring this matter and the facts before the Board to decide whether the leave was a 'simple paid suspension' or if Ms. Herron's leave was exceptionally unreasonable or dilatory'." (Opp. at p. 7:13-15). As legal support for this alleged right to bring the matter before the Board, Complainant cites and quotes *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015). (Id.). However, *Jones* does not state a party is entitled to bring an action before the court to determine whether a paid suspension is "simple" or "exceptionally unreasonable or dilatory," as quoted by Complainant. *See gen, Jones*, 796 F.3d 323. In fact, the words "simple," "unreasonable," "exceptionally," or "dilatory" appear *nowhere* in the opinion, despite the fact Complainant has represented to this Board that the *Jones* decision include such language. Instead, that decision announced the Third Circuit's alignment with all the other circuit courts in holding that "[a] paid suspension pending an investigation of an employee's alleged wrongdoing does not fall under any of the forms of adverse action mentioned by Title VII's substantive provision." *Jones*, 796 F.3d at 326. After announcing its legal holding, the *Jones* court went on to hold the appellant's suspension with pay was not an adverse employment action. *Id.* at pp. 327-332. Thus, the case

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cited by Complainant in her Opposition actually supports the Respondent's argument that a paid suspension is not, as a matter of law, an adverse employment action.

Moreover, the Complainant provides no legal authority for her position an employer is legally required to tell a person the reason(s) why they are being placed on paid leave, or any legal authority requiring an employer to tell a person how long they can expect to be on paid leave or what the employee can expect while on leave. None of these things are adverse employment actions and, as such, cannot salvage the Complainant's claim.

III. CONCLUSION

The Opposition did nothing to effectively or legally refute the arguments advanced in the Motion to Dismiss. Complainant's reliance on Nevada Revised Statute 288.280 is incorrect and she failed to even address the arguments regarding the inapplicability of Nevada Revised Statute 281.370. Further, the Opposition did not demonstrate Complainant suffered an adverse employment action and, in fact, actually demonstrated she did not suffer a legally recognized adverse employment action, as the case she relied upon (1) does not stand for the proposition advanced by Complainant and, (2) actually held a paid leave of absence is not an adverse employment action. As such, the Motion should be granted and Complainant's Complaint should be dismissed.

Dated this 27th day of June, 2024.

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CERTIFICATE OF MAILING

I hereby certify that on the 27th day of June, 2024, I served a copy of the foregoing **RESPONDENT'S REPLY TO COMPLAINANT'S OPPOSITION TO MOTION TO DISMISS** upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

Jason D. Guinasso, Esq.
5371 Kietzke Lane
Reno, NV 89511
Attorney for Complainant

and that there is a regular communication by mail between the place of mailing and the place(s) so addressed.

s/Sherri Mong
an employee of Marquis Aurbach

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